Respondents are asking this Court to act as a super-legislature to judge the wisdom of state tax credits as economic development incentives. Although this subject is open to debate, this Court has stated repeatedly that the state Legislatures are the proper forums to make such decisions. *See, e.g., Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952) (concluding "[o]ur recent decisions make plain that we do not sit as a super-legislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare."). Indeed, the rationale behind this action runs counter to the notion this Court has expressed numerous times that the states are laboratories and should be given wide latitude to fashion innovative programs that meet their particular needs. *See, e.g., Reeves, Inc. v. Stake*, 447 U.S. 429, 441 (1980) (holding "[i]t is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory, and try novel social and economic experiments without risk to the rest of the country.").

Notwithstanding these fatal defects in Respondents' strategy, the mere fact that they have brought this suit inevitably raises serious questions about the legal status of state tax credit programs and contributes to an environment of uncertainty among entrepreneurs and investors alike. To the extent that this atmosphere increases the risk of failure to fragile emerging companies, innovation will suffer.

The interests of the members of *amici* associations that are large companies have been expressed persuasively in the Briefs for Petitioners and in other *amicus* Briefs. This Brief, therefore, will concentrate on the unique considerations of the emerging technology community. Nevertheless, all members of the *amici* associations benefit from the presence in their states of vibrant, well-funded emerging technology companies.

ARGUMENT

I. Respondents Do Not Have Standing to Challenge Ohio's Investment Tax Credit.

This Court, *sua sponte*, directed the parties to brief and argue, "Whether respondents have standing to challenge Ohio's investment tax credit, OHIO REV. CODE ANN. § 5733.33." *DaimlerChrysler Corp. v. Cuno*, 126 S. Ct. 36 (2005). Thus, this Court has made standing a critical threshold question in deciding this action.

Under Article III, standing emanates from the "case or controversy" requirement and the separation of powers. *Allen v. Wright*, 468 U.S. 737, 750 (1984) (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)). The federal courts may exercise power "only when adjudication is 'consistent with a system of separated powers and [the dispute is one] traditionally thought to be capable of resolution through the judicial process.'" *Allen*, 468 U.S. at 752 (alteration in original); *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60 (1992). To establish standing under Article III, Respondents must demonstrate that they have suffered an injury in fact, that they are within the zone of interests protected by the Commerce Clause, and that it is likely that a favorable decision will provide redress to Respondents. Respondents fail under all three prongs. *Associated Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 154 (1970); *Lujan*, 504 U.S. at 561.

A. Respondents Have Not Suffered an Injury In Fact.

First, each of the Respondents must show that he or she has suffered an "injury in fact, economic or otherwise," caused by the Ohio investment tax credit that would constitute an invasion of a "concrete and particularized"

legally protected interest. *Associated Data Processing*, 397 U.S. at 152; *Lujan*, 504 U.S. at 560. Respondents claim injury as taxpayers because the Ohio investment tax credit has purportedly led (or will lead) to a reduction in funding for the City of Toledo and the local school systems. Compl. ¶ 22. However, the Commerce Clause does not eclipse the reserved power of the states to tax for the support of their own governments and to deploy resources within the states as their legislatures deem necessary. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 42 (1824). Respondents merely contend that they are injured by the investment tax credit, but in vague, hypothetical, and generalized ways. Their Complaint does not allege any particularized injury necessary to establish a basis for standing.[8]

Significantly, Peter Enrich, who briefed and argued the case on behalf of the Respondents in the Court of Appeals, has conceded that taxpayers bringing these types of claims against state tax incentives would have only an "attenuated" interest in the outcome of such litigation. Peter D. Enrich, *Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business*, 110 HARV. L. REV. 377, 413 (1996). ("Whereas a business plaintiff can claim a direct and particularized interest in the outcome . . . the citizen/taxpayer plaintiff's interest is more attenuated.")[9]

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[8] The Michigan Respondents claim injury in fact because of some possibility that absent the Ohio investment tax credit, OHIO REV. CODE ANN. § 5733.33, the Petitioner might have located its factory in Michigan. Compl. ¶ 42. Michigan Respondents have no nexus with Ohio. The Michigan Respondents' alleged injury is entirely speculative and even less particularized than the injury alleged by the Ohio Respondents.

[9] Respondent Kim's Auto and Truck Service, Inc. claims injury in fact by alleging that without Ohio's investment tax credit, the Petitioner would not have expanded its Toledo plant. Compl. ¶ 41. This Respondent's business was displaced because of the expansion. However, a jury awarded Kim's $104,000 as compensation in Kim's takings case against

B. Respondents Are Not Within the Zone of Interests Protected by the Commerce Clause.

Even assuming *arguendo* that Respondents had sustained an injury in fact, the second prong of the standing standard rests on whether the investment tax credit "provision [was] intended to benefit the putative plaintiff." *Dennis v. Higgens*, 498 U.S. 439, 449 (1991). Respondents allege that the Ohio investment tax credit violates the dormant Commerce Clause. However, the "very purpose of the Commerce Clause was to create an area of free trade among the several States." *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 328 (1977). "The [Commerce] Clause was intended to benefit those who . . . are engaged in interstate commerce." *Dennis*, 498 U.S. at 449. Respondents do not allege that they are engaged in interstate commerce. The Commerce Clause does not permit states to enact taxes that "discriminate[] against interstate commerce . . . by providing a direct commercial advantage to local business." *Bacchus Imps. v. Dias*, 468 U.S. 263, 268 (1984) (ellipsis in original) (quoting *Boston Stock Exch.*, 429 U.S. at 329). "For over 150 years, our cases have rightly concluded that the imposition of a differential burden on any part of the stream of commerce – from wholesaler to retailer to consumer – is invalid, because a burden placed at any point will result in a

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the City of Toledo. *City of Toledo v. Kim's Auto & Truck Service, Inc.*, No. L-02-1318, 2003 WL 22390102 (Ohio Ct. App. Oct. 17, 2003). Kim's appealed to the Ohio Court of Appeals, which rejected Kim's "public use" argument and affirmed the jury award. *Id.* The Supreme Court of Ohio and then this Court denied further review. *Toledo v. Kim's Auto & Truck Serv., Inc.*, 101 Ohio St. 3d 1469, 804 N.E.2d 42 (2004); *Kim's Auto & Truck Service, Inc. v. City of Toledo, Ohio*, 125 S. Ct. 2988 (2005). Kim's has fully litigated its takings case and has thus obtained complete relief for any injury. Even if this Court were to grant the relief the Respondents seek, Kim's business would not be restored to its previous location and status.

disadvantage to the out-of-state producer." *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 202 (1994).

Unlike Respondents, the plaintiffs who challenged the New York stock transfer tax in *Boston Stock Exchange* had "assert[ed] their right under the Commerce Clause to engage in interstate commerce free of discriminatory taxes on their business and they alleg[ed] that the transfer tax indirectly infringes on that right." *Boston Stock Exch.*, 429 U.S. at 321. The stock transfer tax was within the "zone of interests" protected by the Commerce Clause because the differential cost of the tax depended on the geographic location of the stock exchange as well as the location of the owner of the stock. *Id.* The Ohio investment tax credit is available and equally applied to both in-state and out-of-state businesses. Because Respondents have no connection with the stream of commerce, they do not fall within the zone of interests protected by the Commerce Clause.

C. Any Redress of Respondents' Alleged Injuries is Purely Speculative.

Finally, to establish standing under Article III, Respondents must demonstrate that their injury will "likely be redressed by a favorable decision." *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976). Even if this Court were to affirm the decision of the Court of Appeals, there is no assurance that the allegedly adverse consequences emanating from the tax credit would be remedied. Respondents have suffered no injury in fact, do not fall within the zone of interest protected by the Commerce Clause, and any chance of redressability appears speculative at best.

At a constitutional minimum, Respondents need to establish all three elements of standing before the merits are reached. *Lujan*, 504 U.S. at 560. In fact they are able to meet

none of them. Because standing in the constitutional sense is an essential prerequisite for the exercise of federal judicial power under Article III, the absence of standing by the Respondents is sufficient in itself for this Court to reverse the judgment of the Court of Appeals and direct that this action be dismissed.[10] *Linda R.S. v. Richard D.*, 410 U.S. 614, 616 (1973).

II. Ohio's Investment Tax Credit Is Compatible with the Commerce Clause Because It Is a Non-Discriminatory Initiative to Encourage Investment in the State.

If this Court determines that any of the Respondents has standing to challenge the Ohio investment tax credit, this Court will address the merits of the decision of the Court of Appeals that held that the tax credit violates the dormant Commerce Clause. For the reasons that follow, that decision is wrong and should be reversed.

A. The Court of Appeals Misapplied the Decisions of this Court in Invalidating Ohio's Investment Tax Credit.

The Constitution grants Congress the exclusive right to regulate interstate and foreign commerce. U.S. CONST. art. I, § 8, cl. 3. This Court has interpreted the negative or "dormant" portion of the Commerce Clause to limit a state's

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[10] Ohio's standards for conferring standing follow those that this Court has enunciated for the federal courts. *See, e.g., State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 86 Ohio St. 3d 451, 469-70, 715 N.E.2d 1062, 1081 (1999), ("In order to have standing to attack the constitutionality of a legislative enactment, the private litigant must generally show that he or she has suffered or is threatened with direct and concrete injury in a manner or degree different from that suffered by the public in general, that the law in question has caused the injury, and that the relief requested will redress the injury."). It is thus apparent that Respondents lacked standing to bring this suit in the Ohio courts, as they had done originally.

ability to regulate interstate commerce. A state tax is allowed only when the "tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." *Complete Auto Transit v. Brady*, 430 U.S. 274, 279 (1977). Although the dormant Commerce Clause does not prohibit a state from regulating business within the state, it does restrict a state from engaging in economic protectionism such as unfair taxation of out-of-state transactions.

This Court has repeated consistently that the Commerce Clause constrains a state from regulating commerce in a way that creates barriers to commerce outside the state. *See, e.g., GMC v. Tracy*, 519 U.S. 278, 287 (1997). Yet this Court has also been careful not to tie the hands of states in exercising their taxing powers to promote in-state economic development or to provide special incentives to investment in disadvantaged areas or to targeted sectors of the economy. "We have acknowledged that the delicate balancing of the national interest in free and open trade and a State's interest in exercising its taxing powers requires a case-by-case analysis and that such analysis has left 'much room for controversy and confusion and little in the way of precise guides to the States in the exercise of their indispensable power of taxation.'" *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388, 403 (1984) (quoting *Boston Stock Exch.*, 429 U.S. at 329).

The absence of a precise guide and the adoption by this Court of a careful case-by-case analysis is manifest in the cases the Court of Appeals has cited in its opinion. *See Cuno v. DaimlerChrysler Corp.*, 386 F.3d 738, 744-45 (6th Cir. 2004). The Court of Appeals relied heavily on *Boston Stock Exchange*, in which this Court declared that a New York statute that imposed a greater tax liability on out-of-state stock transactions violated the Commerce Clause. While

holding that the New York statute unduly burdened interstate commerce, this Court was careful to state, "[o]ur decision today does not prevent the States from structuring their tax systems to encourage the growth and development of intrastate commerce and industry." 429 U.S. at 336. This Court emphasized that a state tax credit must be nondiscriminatory by stating, "[w]e hold only that in the process of competition no State may discriminatorily tax the products manufactured or the business operations performed in any other State." *Id.* at 337.

Indeed, this Court has been careful not to limit a state in assisting the growth of in-state industry and commerce. Lower tax rates have been specifically mentioned as permitted incentives: "it is undisputed that States may try to attract business by creating an environment conducive to economic activity, as by maintaining good roads, sound public education or low taxes." *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 199 (1994); *see also Zobel v. Williams*, 457 U.S. 55, 67-68 (1982) (Brennan, J., concurring) ("a State may make residence within its boundaries more attractive by offering direct benefits to its citizens in the form of public services, lower taxes than other States offer, or direct distributions of its munificence."); *id.* at 72, note 1 (O'Connor, J., concurring) ("a State might enact a tax credit for citizens who contribute to the State's ecology by building alternative fuel sources or establishing recycling plants."); *Bacchus Imps.*, 468 U.S. at 271 ("[n]o one disputes that a State may enact laws pursuant to its police powers that have the purpose and effect of encouraging domestic industry."); *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 878 (1985) (per curiam) (restating that promotion of local industry is a legitimate state interest in the Commerce Clause). Nevertheless, the Court of Appeals failed to address this point, focusing instead only on the permissibility of direct subsidies to businesses. *Cuno*, 386 F.3d at 746.

The purpose of the Commerce Clause is not to limit a state's ability to effect policies to promote industry and economic growth within the state, but rather to limit a state's ability to affect interstate commerce by discriminatory taxation. The language and concept of burdened and benefited parties is derived from *Bacchus Imps.*, 468 U.S. at 273. The Court of Appeals quoted from *Bacchus Imports* in support of its decision: "The determination of constitutionality does not depend upon whether one focuses upon the benefited or the burdened party." *Id.* at 273. However, this quotation by the Court of Appeals omitted the next sentence—one which provides a limit to that determination of constitutionality: "A discrimination claim, by its nature, requires a comparison of the two classifications." *Id.* at 273. A comparison allows investigation into one of the factors articulated in *Complete Auto Transit*, the discriminatory effect on interstate commerce of a tax statute.

Unlike the New York stock transfer tax in *Boston Stock Exchange*, which unduly burdened out-of-state transactions, the Ohio investment tax credit benefits all transactions taking place within Ohio. The Court of Appeals did not compare the benefited and burdened parties. Rather, it simply reached a categorical conclusion that tax credits involve regulation of interstate commerce, and thus violate the dormant Commerce Clause. This comparison, which the Court of Appeals failed to make, is crucial for emerging technology companies because they are legitimate beneficiaries of direct or indirect in-state economic development incentives to promote their growth and prosperity and to create jobs.

B. The Dormant Commerce Clause Does Not Foreclose Ohio's Investment Tax Credit or Any Similar Tax Credit Legislation.

Boston Stock Exchange does not contemplate a prohibition on tax incentives as broad as the Court of Appeals adopted. *Boston Stock Exchange* explicitly states that the decision should not be interpreted to invalidate state tax incentives encouraging intrastate economic development. *See* 429 U.S. at 336.

The key distinction between the tax strategies invalidated in *Boston Stock Exchange*, *Bacchus*, and *Westinghouse* and that employed by Ohio is the presence of burdens on out-of-state business and activities in the cited cases, and the absence of such burdens in this action. The Court of Appeals stated that Ohio's investment tax credit burdened interstate commerce by "coercing" companies to remain in Ohio. *See Cuno*, 386 F.3d at 746, note 1. However, the Court of Appeals did not—and could not—substantiate any burdensome effect because "coercion" cannot be found: the investment tax credit operates only prospectively. Indeed, Justice Stevens has written, "[n]or, in my judgment, does [the Commerce] Clause inhibit a State's power to experiment with different methods of encouraging local industry. Whether the encouragement takes the form of a cash subsidy, a tax credit, or a special privilege intended to attract investment capital, it should not be characterized as a 'burden' on commerce." *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 816 (1976) (Stevens, J., concurring). The investment tax credit is a method that Ohio has adopted to promote economic development and to encourage investment and job creation in economically disadvantaged areas such as Toledo. It does not burden out-of-state business.

III. Affirmance of the Decision of the Court of Appeals Will Interfere with the Ability of States to Enhance Their Economic Prospects, Promote Innovation, and Encourage Investment in Their Technology Sectors.

A. Entrepreneurs and Emerging Businesses in the Technology Sector Will Suffer from the Instability in the Capital Markets that Will Ensue from Affirmance of the Decision Below.

Start-up and early-stage companies are engines of growth and provide great potential for local and regional economies. Nearly 70 percent of economic growth is attributed to such companies, and they are responsible for creating two-third of all new jobs.[11]

Although start-up and early-stage companies are critical for economic growth, they encounter substantial difficulty obtaining funding. Good business ideas often are unfulfilled because the entrepreneur cannot increase the initial $5,000 to $500,000.[12] Early funding usually comes from family and friends and is usually insufficient to keep the business running until additional sources can be identified and convinced to invest.

In contrast, the source of funding least available to start-up and early-stage companies is institutional venture capital. Institutional investors typically do not invest in such companies, generally because it is not financially feasible to

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[11] PHIL PSILOS, ET AL., A GOVERNOR'S GUIDE TO STRENGTHENING STATE ENTREPRENEURSHIP POLICY 4, 6 (2004), *available at* http://preview.nga.org/Files/pdf/0402GOVGUIDEENTREPRENEUR.pdf.

[12] John Torinus, *State needs daring measures to get new businesses up, running*, JOURNAL SENTINEL (Milwaukee), Sept. 20, 2003, at P03, *available at* http://www.jsonline.com/bym/news/sep03/171158.asp.

make investments of the size these companies require.[13] For example, the University of Wisconsin Foundation has more than $1 billion in assets under management but does not invest directly in companies.[14]

In 2003, the total institutional investment in entrepreneurial ventures totaled $18.2 billion, but only $304 million of that went to seed and start-up stage companies.[15] Fewer than one in every ten thousand start-up companies received its initial financing from venture capital firms.[16]

Angel investors play an important role in funding companies in phases between individual and institutional investment.[17] Angel investors, individuals having substantial personal assets and a desire to invest in local start-up businesses, are increasingly recognized as a critical component to a state's entrepreneurial community.[18] More than 300,000 angel investors were estimated to have invested approximately $30 billion in 2002 in over 50,000 deals, far outpacing the institutional venture capital market.[19]

For early-stage companies, location decisions are based on factors such as family considerations, access to faculty, facilities, and other resources of affiliated research

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[13] Tom Still, *Investment tax credit bill is a good start, but Wisconsin must confront other barriers to capital formation* (Apr. 21, 2004), *at* http://wistechnology.com/article.php?id=771.

[14] *Id.*

[15] Maria Minniti & William D. Bygrave, Global Entrepreneurship Monitor, National Entrepreneurship Assessment • United States of America, 2003 Executive Report 7 (2004), *available at* http://www.gemconsortium.org/download.asp?fid=355.

[16] William D. Bygrave & Stephen A. Hunt, GEM Financing Report 2004 20 (2005), *available at* http://www.gemconsortium.org/download.asp?fid=365.

[17] PSILOS, *supra* note 11, at 27.

[18] *Id.*

[19] *Id.*

institutions, suitable and affordable space, availability of skilled managers and workers, and eligibility for business assistance and economic development incentives. Even a cursory review of the weekly electronic newsletter of the National Association of Seed and Venture Funds[20] reveals that nowhere is the variety of economic development models and the importance of states' ability to experiment with different incentives to attract individual and institutional investment more evident than in the emerging technology sector.

The types of tax credits that are most beneficial to emerging technology companies are those that are refundable, those that can be carried forward to periods in which the company can reasonably expect to offset them against taxable income, or those that provide an indirect benefit by reducing the risk to potential investors and thus facilitating the ability to obtain funding. In that sense, such tax credits, as well as the Ohio investment tax credit, are the functional equivalents of subsidies. Even the Court of Appeals acknowledged that subsidies are consistent with the Commerce Clause. *Cuno*, 386 F.3d at 742.

An increasing number of states, including Maryland, offer tax credits to angel and institutional investors. *See, e.g.*, MD. CODE ANN., TAX-GEN. § 10-725 (LexisNexis Supp. 2005). Virginia, Maine, Vermont and West Virginia offer credits of up to 50 percent of investments subject to certain limitation. VA. CODE ANN. § 58.1-339.4 (2004 & Supp. 2005), ME. REV. STAT. ANN. tit. 10 § 1100-T (Supp. 2005), VT. STAT. ANN. tit. 32, § 5930k (Supp. 2005), W. VA. CODE § 11-13C-7a (2003). Hawaii offers to qualifying high-technology businesses a tax credit which can cumulate over five years to 100 percent of an investment. HAW. REV. STAT. ANN. § 235-110.9 (LexisNexis Supp. 2005).

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[20] NASVF NetNews, *at* http://www.nasvf.org/web/netnews.nsf.

Tax credits can confer benefits to emerging technology companies in addition to encouraging angel and institutional investment. Refundable investment and R&D tax credits such as those enacted by New York in 2005, may assist start-up and early-stage companies in obtaining bank loans. For example, Canadian banks are willing to lend to start-up companies using their refundable investment tax credit as collateral.[21] Such loans can be made for up to 75 percent of the federal refundable investment tax credit.[22]

State tax investment incentives are thus crucial in helping local start-up and early-stage businesses, and play an important role in creating future economic growth and new jobs. In addition, because start-up companies are important sources of new ideas and technologies, state tax investment incentives such as Ohio's investment tax credit promote innovation. This is critical for the future of not only Ohio but of the United States as a whole.

B. Invalidating Ohio's Investment Tax Credit and Similar Statutes in Other States Will Not Level the Playing Field but Instead Will Siphon Investment to Countries that Offer Such Incentives.

Like Ohio's tax incentive, most state tax credit incentives restrict the tax credit to the in-state activities. Alabama, for example, provides an income tax credit for new investment in Alabama, ALA. CODE § 41-23-24(a) (2000); Arizona provides an income tax credit for taxpayers who increase in-state research activities, ARIZ. REV. STAT. ANN. § 43-1168 (Supp. 2005); Connecticut provides an income tax credit for investing in certain new manufacturing facilities in

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[21] Scotiabank - Investment Tax Credit Loan, *at* http://www.scotiabank.com/cda/content/0,1608,CID361_LIDen,00.html (last visited Nov. 29, 2005).

[22] *Id.*

Connecticut, CONN. GEN. STAT. ANN. § 12-217e (West 2000); Missouri provides an income tax credit for investing in small business in Missouri, MO. ANN. STAT. § 135.400-33 (West 2000 & Supp. 2005); and Maryland provides an income tax credit for investing in biotechnology companies, MD. CODE. ANN., TAX-GEN. § 10-725 (2005).

As already discussed, the decision of the Court of Appeals will result in the unintended consequence of impeding innovation among early-stage companies and impacting on entrepreneurship. Moreover, it will influence the location of facilities and operations by those technology companies that achieve profitability. Many nations and their political subdivisions already offer tax credits that are more attractive than the Ohio investment tax incentive struck down by the Court of Appeals. Such countries are already attracting American companies because of these incentives. This Court should consider the effects of restricting state tax credit incentives on the future competitiveness of the United States.

The United States now faces robust competitive challenges from China, Canada, India, Ireland, Taiwan, South Korea, Singapore, and other countries. These countries see their futures tied directly to becoming powerhouses in technology and innovation, primarily at the expense of the United States. Therefore, states must be permitted to develop programs with a keen awareness of the efforts being made by other countries to compete for technology, facilities, and jobs. The Council on Competitiveness examined foreign incentive packages as part of the National Innovation Initiative ("NII"). The NII called upon "[m]ore than 400 leaders and scholars from universities, corporations, professional societies, industry associations,

and government."[23] The NII's final report, "Innovate America," states that "America's [collective] challenge is to unleash its innovation capacity. . . . At a time when macro-economic forces and financial constraints make innovation-driven growth a more urgent imperative than ever before."[24] The NII outlined the "unprecedented acceleration of global change . . . fierce competition from countries that seek an innovation-driven future for themselves."[25] One of the necessary solutions the NII proposed is that the Government should increase the availability of early-stage risk capital with tax incentives, expanded angel networks, and state and private seed capital funds.[26]

The NII Report warned that "Sweden, Finland, Israel, Japan, and South Korea each spend more on R&D as a share of GDP than the United States."[27] "China overtook the United States in 2003 as the top global recipient of foreign direct investment."[28] "Only six of the world's 25 most competitive information technology companies are based in the United States; 14 are based in Asia."[29]

States wishing to enhance the economic welfare of their citizens must consider innovative incentive packages for technology companies and potential investors in light of incentives offered by foreign competitors. "The government of Canada is modifying the [Scientific Research & Engineering Development] credit mechanism to make it more attractive to foreign investors on an after-tax basis, taking account of the foreign investor's home country tax laws in

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[23] COUNCIL ON COMPETITIVENESS, INNOVATE AMERICA: NATIONAL INNOVATION INITIATIVE REPORT 13 (2004).
[24] *Id.* at 5.
[25] *Id.*
[26] *Id.* at 35-36.
[27] *Id.* at 12.
[28] *Id.*
[29] *Id.*

order to increase investment in Canadian-based R&D, without reducing the government's net tax revenues."[30] This change, which is still draft legislation, should help a number of venture capital funded high-tech start-ups.[31]

South Korea's 2004 tax reform included several measures to boost corporate investment, including a reduction in the alternative minimum tax rate for small and medium-sized enterprises, and an extension and increase in the temporary investment tax credit for capital spending.[32]

Firms investing at least NT$25 million and increasing employment by at least 50 persons in underdeveloped Taiwanese regions are eligible for a tax credit equal to twenty percent of new investment.[33] Alternatively, they may choose not to pay corporate income tax for the specific year the investment is approved.[34]

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[30] David V. Daubaras, *Scientific Research & Experimental Development*, TAX EXECUTIVE, Nov. 1, 2004, at § 15, *available at* 2004 WLNR 16849433.

[31] Denis Lajoie, *Canada's Scientific Research and Experimental Development Program is in a State of Continuous Improvement with a Number of Recent Evolutions*, CA MAGAZINE, Aug. 1, 2005 *available at* 2005 WLNR 13911470.

[32] Economist Intelligence Unit, *Country Commerce South Korea 2004/2005 Main Report*, COUNTRY COMMERCE, July 30, 2004, *available at* 2004 WLNR 13972426.

[33] Economist Intelligence Unit, *Country Commerce Taiwan, Incentives: Regional Incentives*, COUNTRY COMMERCE, July 30, 2004, *available at* 2004 WLNR 15862193.

[34] Taiwan also offers specialized industrial parks in which, for example, companies may enjoy a five-year tax holiday, import-duty exemption, and a 20% ceiling on corporate income tax for investments in the manufacture of precision instruments, machinery and electronics. Also, a special 15% investment-tax credit, which may be deferred for up to four years, is available to companies undergoing capital expansion. More than 375 companies have commenced operations in one such park including 159 integrated-circuit manufacturers, 54 telecommunications firms, 60 opto-electronics firms, 57 computer and peripherals makers, 27 biotechnology companies, and 21 precision-machinery manufacturers. Fifty-seven are

As related to early-stage technology companies, state tax credit incentives to promote in-state R&D, investment and job creation in the technology sector are the opposite of "corporate welfare." These incentives do not discriminate against interstate commerce and are essential to promote innovation and enhance the long-term economic growth not only of each state but also the entire United States. Such incentives are at the very core of what the Commerce Clause was intended to create: an economic union of the states in which the success of each benefits all. *See Boston Stock Exch.*, 429 U.S. at 328. The decision of the Court of Appeals, which reached the opposite conclusion, is plainly wrong and should be reversed.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals holding that the Ohio investment tax credit, OHIO REV, CODE ANN. § 5733.33, violates the Commerce Clause should be reversed and the action dismissed.

Respectfully Submitted.

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Dated: December 5, 2005

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foreign companies including Royal Philips Electronics, Mitsubishi, Shin-Etsu Optoelectronics, Taisil Electronic Materials, Hewlett-Packard, Motorola, Logitech, and Siemens. Economist Intelligence Unit, *supra* note 33.

EXHIBIT

HB 664

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April 28, 2005

The Honorable Robert L. Ehrlich, Jr.
Governor of Maryland
State House
Annapolis, Maryland 21401-1991

Re: House Bill 664

Dear Governor Ehrlich:

We have reviewed House Bill 664, "Biotechnology Investment Incentive Act," which was signed April 26th, for constitutionality and legal sufficiency. We write to discuss significant Commerce Clause issues raised by the bill.[1]

House Bill 664 provides a credit against State income tax for large investments made in qualified Maryland biotechnology companies. In order to qualify, a biotechnology company must have its headquarters and base of operations in Maryland. The tax credit allowed is 50% of the investment, up to $50,000 for an individual, $250,000 for a corporation, and $250,000 for a qualified Maryland venture capital firm. If the tax credit exceeds the total tax otherwise payable, the investor may claim a refund in the amount of the interest. Availability of the refund is dependent on the appropriation of money to the biotechnology investment tax credit reserve fund.[2] A system is set up whereby the Department of Business and Economic Development issues an initial tax credit certificate on a first come first served basis to investors intending to invest in a Maryland biotechnology company. Such certificates may be issued only to the extent that money is available in the reserve fund. Thus, investors know whether the credit will be available at the time that the investment is made.

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[1] This letter confirms and explains oral advice given April 25, 2005.

[2] While the bill purports to require that the Governor make an appropriation to this fund, it does not specify an amount, or set a formula by which an amount can be determined. As a result, the Governor has the discretion not to make any appropriation for this purpose.

The Commerce Clause of the United States Constitution provides that Congress has the power to "regulate Commerce ... among the several States." United States Constitution, Article I, § 8, clause 3. Although stated as a grant of power to Congress, the Clause has long been understood to prohibit state interference with interstate commerce. *H.P. Hood and Sons, Inc. v. Du Mond*, 336 U.S. 525, 535 (1949). Such interference can arise from state taxation. A State tax will be upheld where it is applied to an activity with a substantial nexus with the taxing state, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to services provided by the state. *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977). House Bill 664 raises issues under the third of these factors: discrimination against interstate commerce.

In *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977), the Supreme Court examined the issue of whether a New York statute taxing securities transactions more heavily if they involved an out-of-state sale violated the Commerce Clause. The Court concluded that it did, stating that one of the "fundamental principles" of Commerce Clause jurisprudence is that a State may not "impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business." *Id.* at 329. The Court found that the differential taxation meant that the choice of stock exchange by persons engaging in large transactions would not be made solely on the basis of nontax criteria. As a result, it acted to give the New York exchange a direct commercial advantage in violation of the Commerce Clause.

More recently, in *Fulton Corporation v. Faulkner*, 516 U.S. 325 (1996), the Court considered a North Carolina statute that imposed a tax on the value of corporate stock owned by State residents, with the amount of the tax varying depending on the exposure of the corporation to the State's income tax. The practical effect was that the tax was low or nonexistent on corporations in the State and significantly higher with respect to corporations that did little or no business in the State. The Court found that the tax facially discriminated against interstate commerce, in that it favored "domestic corporations over their foreign competitors in raising capital among North Carolina residents and tends, at least, to discourage domestic corporations from plying their trades in interstate commerce."

Cases from lower courts have reached similar conclusions. In *Smith v. New Hampshire Dept. of Revenue Admin.*, 692 A.2d 486 (N.H. 1997) *cert. denied* 538 U.S. 1025 (2003), the Court held that an exemption for interest and dividend income from investment in State financial institutions violated the Commerce Clause. Most recently, in *Cuno v. DaimlerChrysler, Inc.*, 386 F.3d 738 (6th Cir. 2004), the Sixth Circuit held that a tax credit for purchases of new manufacturing machinery and equipment if the new machinery or

equipment was installed in Ohio violated the Commerce Clause. This case is being appealed to the Supreme Court (Petition for Certiorari Filed Apr 18, 2005) but the Court has not made a decision whether to take the case.[3]

While none of the cases above are precisely analogous to House Bill 664, it is our view that that bill, which provides a direct commercial advantage to local business, and favors domestic business in raising capital, raises similar significant Commerce Clause issues. Therefore, we would recommend that alternate approaches be considered at a future legislative session.

Very truly yours,

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cc: Kenneth H. Masters
Secretary of State
Karl Aro

[3] The *Cuno* case is the most far-reaching of these cases, in that it reaches tax credits available to out-of-state companies based on activities and job creation in the State, and the broad reach of the case has been questioned. *See* Gillis, *Sixth Circuit Bans Ohio Tax Credit Under the Commerce Clause*, 101 J. Tax'n 359, 2004 WL 2801135 (December 2004). Whether this extension of the Supreme Court cases is correct, however, is not relevant to the issues raised by House Bill 664.

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Nos. 04-1704 and 04-1724

IN THE
Supreme Court of the United States

DAIMLERCHRYSLER CORPORATION, ET AL.,

Petitioners,

v.

CHARLOTTE CUNO, ET AL.,

Respondents.

WILLIAM W. WILKINS, ET AL.,

Petitioners,

v.

CHARLOTTE CUNO, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF AMICUS CURIAE ASHBROOK CENTER FOR PUBLIC AFFAIRS IN SUPPORT OF PETITIONERS

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December 5, 2005

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QUESTIONS PRESENTED

Whether Ohio's Investment Tax Credit, Ohio Revised Code § 5733.33, which seeks to encourage economic development by providing a credit to taxpayers who install new manufacturing machinery and equipment in the State, violates the Commerce Clause of the United States Constitution.

Whether respondents have standing to challenge Ohio's investment tax credit, Ohio Rev. Code Ann. § 5733.33.

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On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF AMICUS CURIAE ASHBROOK CENTER FOR PUBLIC AFFAIRS IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE[1]

The Ashbrook Center for Public Affairs ("Ashbrook Center") is an educational organization located at Ashland

[1] This brief is filed in accordance with the global consent letters filed by Petitioners and Respondents with this Court. Pursuant to Supreme Court Rule 37.6, the Ashbrook Center states that no counsel for any party authored this brief in whole or in part, nor did any person or entity, other than *amicus*, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

University in Ashland, Ohio. For over twenty years the Ashbrook Center has provided a forum for the study, research, and discussion of the principles and practices of the American government. Consistent with this mission, the Ashbrook Center advocates the defense of individual liberty, limited constitutional government, and civic morality.

The Ashbrook Center recognizes the importance of Article III's standing requirement as an essential element of the separation of powers and a safeguard of democratic self-governance. The Ashbrook Center also recognizes that the principles of federalism embodied in the Constitution in general and in the Commerce Clause in particular permit the States to compete amongst themselves by lowering taxes to encourage investment. The Ashbrook Center has a strong interest in preserving the principles embodied in the Constitution, including those in the Commerce Clause.

SUMMARY OF THE ARGUMENT

Respondents do not have standing to challenge Ohio's investment tax credit ("ITC"), Ohio Rev. Code § 5733.33. Most of the Respondents assert claims based only upon their status as citizens and taxpayers. Such generalized grievances, which are shared by a large class of citizens, are insufficient to establish federal jurisdiction.

The complaint asserts varying claims brought by three groups of plaintiffs: (1) Ohio citizens/taxpayers, who allege that the operation of Ohio's ITC decreases state revenues and imposes a disproportionate tax burden on them; (2) Michigan citizens/taxpayers, who claim that they were denied various "economic opportunities" when DaimlerChrysler Corporation located its plant in Ohio, rather than Michigan; and (3) residents of Toledo who allege that they were

displaced by the development of DaimlerChrysler's Toledo plant.

None of these three groups meet the minimum standing requirements of injury in fact, causation, and redressability. Respondents' allegations regarding state revenues and relative tax burdens are indefinite, generalized grievances that do not warrant federal jurisdiction. Nor could the alleged harms to the Michigan Plaintiffs or the displaced Toledo residents even be redressed by a favorable decision from this Court. An injunction entered against the operation of Ohio Rev. Code § 5733.33 would not result in relocation of DaimlerChrysler's Jeep plant from Ohio to Michigan, and would not return properties to the individuals alleging "displacement." Because no Respondent has standing to challenge the tax credit, the Sixth Circuit's decision should be vacated.

If this Court reaches the merits of Respondents' claims, it should reverse the judgment of the circuit court. The "dormant" or "negative" aspect of the Commerce Clause is fundamentally aimed at prohibiting protectionist measures that benefit in-state interests by discriminating against or imposing undue burdens on interstate commerce. The Commerce Clause does not, however, prevent states from competing for a share of interstate commerce. To the contrary, this Court has repeatedly emphasized that such competition -- including efforts to attract businesses through low taxes -- is a central element of our nation's free-trade policy.

Ohio's ITC is consistent with the principles enunciated by the Court. The tax credit is not a protectionist measure. It is equally available to in-state and out-of-state businesses; imposes no burden on taxpayers who choose to invest elsewhere; and does not discriminate against interstate commerce.

The Sixth Circuit's holding that such a credit violates the Commerce Clause is a significant departure from this Court's case law. This Court has emphasized that the Commerce Clause does not prohibit all state action designed to give its residents an advantage in the marketplace, but *only* those regulations that burden interstate commerce. In finding Ohio's ITC unconstitutional, the Sixth Circuit simply failed to distinguish between laws that discriminate against interstate commerce and those, like Ohio's tax credit, that are part of the State's permissible efforts to encourage intrastate development.

ARGUMENT

I. Respondents Do Not Have Standing to Challenge Ohio's Investment Tax Credit.

As an initial matter, Respondents have not alleged a sufficient injury to confer standing under Article III. Although the parties did not press the issue before this Court, the Court correctly directed the parties to brief the question of standing because it is apparent that Respondents have failed to allege a cognizable injury in fact. *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 230-31 (1990) ("Although neither side raises the issue [of standing] here, we are required to address the issue even if the courts below have not passed on it, and even if the parties fail to raise the issue before us.") (citation omitted).

Respondents' response to the petitions for certiorari makes clear that they assert their claims based upon their status as citizens and taxpayers. Respondents complain of the "impacts [of the tax credit] on state and local revenues and on the distribution of costs of government among different classes of taxpayers." Resp'ts Br. in Resp. to Pet. for Cert. at 6, Case Nos. 04-1704, 04-1724. The harms that